Supreme Court, U. S.
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AUG 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-22

AIR FREIGHT HAULAGE CO., INC.,

Petitioner,

against

RYD-AIR, INC., AIR CARGO, INC., RYDER SYSTEM, INC., AMERICAN AIRLINES, INC., EASTERN AIRLINES, INC., NORTHEAST AIRLINES, INC., AIR CANADA, ALLEGHENY AIRLINES, INC., BRANIFF AIRWAYS, INC., BRITISH OVERSEAS AIRWAYS CORP., DELTA AIRLINES, INC., FLYING TIGER LINES, INC., MOHAWK AIRLINES, INC., NATIONAL AIRWAYS, INC., NEW YORK AIRWAYS, INC., NORTHWEST AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AVIATION, INC., AIRLIFT INTERNATIONAL, INC., SEABOARD WORLD AIRLINES, INC., SOUTHERN AIRWAYS, INC., TRANS WORLD AIR LINES, INC., UNITED AIR LINES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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August 2, 1979

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OCTOBER TERM, 1979

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Air Freight Haulage Co., Inc.,

Petitioner,

against

Ryd-Air, Inc., Air Cargo, Inc., Ryder System, Inc., American Airlines, Inc., Eastern Airlines, Inc., Northeast Airlines, Inc., Air Canada, Allegheny Airlines, Inc., Braniff Airways, Inc., British Overseas Airways Corp., Delta Airlines, Inc., Flying Tiger Lines, Inc., Mohawk Airlines, Inc., National Airways, Inc., New York Airways, Inc., Northwest Airlines, Inc., Ozark Airlines, Inc., Pan American World Airways, Inc., Piedmont Aviation, Inc., Airlift International, Inc., Seaboard World Airlines, Inc., Southern Airways, Inc., Trans World Air Lines, Inc., United Air Lines, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

This brief is submitted jointly by all respondents in opposition to the Petition for a writ of certiorari filed by petitioner Air Freight Haulage Co., Inc.

Questions Presented

1. Was the finding of fact by the District Court that there is no evidence to support either a *per se* violation or an unreasonable restraint of trade in violation of Sherman Act, Section 1 erroneous?

2. Was the finding of fact by the District Court that the relevant market in this case for purposes of Section 2 of the Sherman Act and Section 7 of the Clayton Act is the ground transportation of air freight to and from the metropolitan New York airports as provided by air freight forwarders, independent contractors, house truckers and the respondent, Air Cargo, Inc., erroneous?

Statement of the Case

The Facts

In the spring of 1969 the respondent, Air Cargo, Inc. ("ACI"),* commenced a search for a new trucker to replace petitioner and two other trucking companies then employed by ACI to pick up and deliver air freight enplaned and deplaned at the New York City airports (5a).** This search was prompted because, in the words of petitioner's own witness, the existing service was "far, far below standard" (5a).

In the spring of 1970 ACI awarded the new contract to respondent Ryd-Air, Inc. ("Ryd-Air") (5a). When ACI found the service provided by Ryd-Air costly and unsatisfactory, ACI terminated its agreement with Ryd-Air in

* ACI is wholly owned by the domestic airlines and is employed by them under an agreement dated March 1, 1947 (the "ACI agreement") to provide air freight pickup and delivery service, directly or by contract, at all points within the continental United States. The ACI agreement was approved by the Civil Aeronautics Board (the "CAB") on December 31, 1947 (CAB Order Serial No. E-1086) (3a, 12a). The ACI agreement is of continuing duration and is still in effect. Five amendments thereto have likewise been filed with and approved by the CAB (13a). The most recent amendment authorized ACI to extend its operations in providing pickup and delivery service for the airlines at Guam and other points outside the United States (CAB Order No. 75-6-37, dated June 6, 1975) (13a).

** References so indicated are to the opinion of the District Court as set out at pp. 3a-15a of the Petition herein.

October of 1973 (6a). Since that date ACI has provided a direct service of its own (6a).

The Findings of the District Court

Based on the evidence at the trial, the District Court made the following findings of fact:

(1) There is no evidence that the airlines, collectively, decided to terminate the service provided by the prior ACI contractors (8a);

(2) ACI was responsible both for the initial decision to replace these contractors with Ryd-Air and the subsequent decision to provide direct pickup and delivery service (8a);

(3) ACI terminated the services of the three prior contractors not out of any anti-competitive intent, but only to improve the quality of its pickup and delivery service (9a);

(4) There is no evidence that competition has lessened among suppliers of pickup and delivery service in the New York area since 1970. Competition in this market is healthy and ACI's share has actually decreased since the formation of Ryd-Air (9a);

(5) The relevant product market in this case is the ground transportation of air freight to and from the metropolitan New York airports. The testimony establishes that this service is provided, without significant differences, by air freight forwarders, independent contractors, house truckers, as well as ACI (6a); and

(6) There is no evidence that the defendants possess monopoly power in this market. The testimony on market share establishes that, during the last ten years, ACI has possessed, at most, only 10.1% of the domestic market for ground transportation of air

freight in New York's Area A and, in 1977, possessed only 5.4% of this market (10a).

The Holding of the Court of Appeals

On April 6, 1979 the United States Court of Appeals for the Second Circuit unanimously affirmed the order and judgment of the District Court "on the opinion below of the Hon Morris E. Lasker, 1978-2 CCH Trade Cas. ¶ 63,321 (S.D.N.Y. Oct. 10, 1978)" (1a-2a).

REASONS FOR DENYING THE WRIT

The Findings of the District Court, Concurred in by the Court of Appeals, Are Correct.

Contrary to the petitioner's assertions, this case does not raise any issues worthy of review by this Court.

There can be no question but that the factual findings of the District Court, unanimously affirmed by the Court of Appeals, are correct. Each finding is fully supported by the record. Nor does petitioner point to any evidence whatever to dispute the finding that there was no collective action by the airlines to terminate such service in 1969 (8a).

This Court has repeatedly stated that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636 (1967); *International Brotherhood of Electrical Workers* v. *Foust*, —— U.S. ——, 99 S.Ct. 2121, 2124 at fn. 7 (1979). No error is shown here.

Petitioner complains in this Court, as it did in the Court of Appeals, that the District Court erred in finding that ACI acted independently of the airlines when it replaced the existing ACI contractors with Ryd-Air (Petition, p. 12).

Petitioner's argument is directly contrary to the position taken by petitioner in the District Court. Throughout the trial, petitioner had argued that there was not a shred of evidence to establish that ACI was acting as agent for the airlines or that the airlines had ratified ACI's action.*

The District Court noted petitioner's position that ACI alone was responsible for replacing the 1969 ACI contractors, stating (5a):

> "Indeed, Air Freight Haulage itself attempted to prove at trial, during the examination of Mr. Lambert (Lambert, 557) and Mr. Miller (Miller, 825), that ACI alone was responsible for replacing the earlier service in order to refute the contention of the defendants that the airlines supervised and ratified the decision and thus immunized the actions from the operation of the antitrust laws. (See *Breen Air Freight* v. *Air Cargo, Inc.*, 470 F.2d 767 (2d Cir. 1972))."

It is too late for petitioner to complain in this Court that the District Court made the finding which petitioner had urged at the trial.

Petitioner's assertions of a collective refusal to deal are not supported by the trial record. There is no evidence that any airline has refused to carry air freight brought to it for shipment by petitioner (and the record includes conduct between 1970 and the date of the trial in 1978); that any airline has refused to advance cartage charges to petitioner on air freight brought to it for shipment by petitioner; or that any airline has failed to follow routing instructions filed by a shipper specifying that petitioner was

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* At the conclusion of its case, petitioner's trial counsel stated: "Your Honor, I feel very strongly about this. There has been, and I will say it again, not one iota of evidence to talk about ratification here." (See p. 912a, Joint Appendix in the United States Court of Appeals.)

to handle the pickup or delivery of air freight for that shipper.

The testimony fully establishes, and the courts below correctly held, that the relevant product market in this case is the ground transportation of air freight to and from the metropolitan New York airports as provided by air freight forwarders, independent contractors, house truckers and ACI. As the District Court correctly noted, "ACI competes for customers with air freight forwarders, house truckers, and independent contractors . . . and . . . there is cross-elasticity of demand between ACI's services and those of the other carriers" (7a).

Finally, petitioner argues that the formation of Ryd-Air was part of a conspiracy among the airlines to fix uniform industry-wide prices to their shipping customers for the service of air freight trucking.

Petitioner attempted to inject this red-herring issue in its post-trial memorandum. The issue was not set forth in the Pre-Trial Order; nor was it one of the theories on which the case was tried. Understandably, the District Court never dealt with the issue.

Had petitioner raised its price-fixing claim in either the Pre-Trial Order or in the course of the trial, it properly would have been dismissed. Petitioner was not in the "target area" of the alleged antitrust conspiracy it claims; it therefore lacks standing. *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2 Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2 Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Kemp Pontiac-Cadillac, Inc.* v. *Hartford Automobile Dealers' Association, Inc.*, 380 F. Supp. 1382, 1386-87 (D. Conn. 1974).

Even had the alleged price-fixing agreement been an issue, the evidence would not support a claim of price fixing. It was undisputed at the trial that pricing the pickup and delivery service was essentially the same, both

before and after the organization and operation of Ryd-Air: ACI and each trucker agreed on the rates the trucker would charge ACI for its pickup and delivery service; ACI charged the airline for such services; and the airline in turn included this charge in the amount payable by the shipper or consignee under the airline tariff filed with the CAB.* As far back as 1949 the airlines agreed they would not charge shippers less than ACI charged for pickup and delivery service, and this agreement was approved and immunized by the CAB (Order Serial No. E-2679, April 1, 1949). Since that time, each airline's tariff has reflected ACI's charges to the airline pursuant to this CAB-approved agreement.

Petitioner's belated claim of price fixing is baseless.

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* The CAB long ago observed: "The rates of the airline cartage agent can now be negotiated by Air Cargo, Inc., and reviewed by the Board in the light of the competing rates of independent truckers in the area. . . ." *Local Cartage Agreement Case*, 15 C.A.B. 850, 856 (1952).

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Dated: New York, New York
August 2, 1979

Respectfully submitted,

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